No. 11

In the Supreme Court of the United States

OCTOBER TERM, 1961

HERMAN LIVERIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 21–31) is reported at 280 F. 2d 708.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1960 (Pet. App. 32). On July 13, 1960, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including August 17, 1960. The petition was filed on August 16, 1960, and certiorari was granted on June 19, 1961. 366 U.S. 960. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Senate Resolution 366 of the 81st Congress and Senate Resolution 174 of the 84th Congress authorized the Internal Security Subcommittee to conduct the hearing at which petitioner appeared.

2. Whether petitioner can claim for the first time at his trial that, under the Legislative Reorganization Act of 1946, the Subcommittee could not properly hold the hearing at which he appeared, and, if he can, whether that Act provides grounds upon which to reverse his conviction.

3. Whether the Subcommittee violated petitioner's rights under the First Amendment.

4. Whether petitioner raised the issue of pertinency before the Subcommittee and, if not, whether he can raise this issue for the first time at his trial.

5. Whether the questions petitioner refused to answer were pertinent to the subjects under inquiry.

6. Whether petitioner, who was indicted by a grand jury composed, in part, of federal employees, was entitled to dismissal of the indictment or a hearing on the basis of general allegations that such jurors were biased and afraid as a result of the government security program.

7. Whether the indictment was invalid because it failed to specify the subject under inquiry and the pertinency of the questions to that subject, and did not allege that petitioner's refusal to answer was wilful.

8. Whether the trial court deprived petitioner of a fair trial by denying his motion to subpoena the Subcommittee's files and by refusing to allow him to

secure the name of a confidential informant through cross-examination.

STATUTES AND RESOLUTION INVOLVED

Relevant portions of 2 U.S.C. 192, as amended; the Legislative Reorganization Act of (August 2) 1946, c. 753, Title I, Sections 133, 134, 60 Stat. 831–832 (2 U.S.C. 190a, 190b); and Senate Resolution 366, 81st Cong., 2d Sess., are set forth in petitioner's brief at pp. 49–51. In addition, Section 2 of the Resolution states:

> The committee, or any duly authorized subcommittee thereof, is authorized to sit and act at such places and times during the sessions, recesses, and adjourned periods of the Senate * * * as it deems advisable.

STATEMENT

Petitioner was charged in a fifteen-count indictment in the District Court for the District of Columbia with having refused, in violation of 2 U.S.C. 192, to answer fifteen questions, pertinent to the matter under inquiry, put to him by the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary (J.A. 1–3). Upon a trial by jury, petitioner was found guilty on counts 1 through 14 (J.A. 134). Count 15 was dismissed (J.A. 126). Petitioner was sentenced by the district court to imprisonment for three months and to pay a fine of five hundred dollars (J.A. 12). The judgment of the trial court was affirmed by the court of appeals.

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The pertinent facts may be summarized as follows:

The counsel of the Subcommittee testified at petitioner's trial concerning the reason petitioner was subpoenaed to testify. He said that, at the time petitioner was subpoenaed, the Subcommittee had information that petitioner had been active in Communist activities in New York and subsequently had been transferred to New Orleans with orders to carry on Party activities there (J.A. 76–77); that petitioner moved to New Orleans for the purpose of becoming active in and ultimately taking over the direction of the professional branch, which was an underground operation of the Party (J.A. 78); that because of his work in television, and mass communications generally, the Communist Party felt that he was an important asset, and therefore wanted to use him to bolster their activities in New Orleans (J.A. 99); that secret Communist activities were held at one of the addresses in New Orleans where petitioner resided, 333 Ware Street (J.A. 75–81); that, after petitioner had gone to New Orleans, the Communist leadership cautioned petitioner to stay away from open Communist activities (J.A. 80–81); that petitioner and his wife had rented a post office box in White Plains, New York, under the name of the Westchester County Committee for Ethel and Julius Rosenberg, which was part of a fund-raising drive in behalf of two Communists who had been convicted and sentenced to death for violation of the Espionage Act (J.A. 79–80); that this committee was raising money for Communist purposes in addition to the purpose of collecting defense funds for the Rosenbergs (J.A.

79–81); that petitioner had been a Party member shortly before he appeared before the Subcommittee (J.A. 77); that petitioner had subscribed to Communist Party nominating petitions[1] (J.A. 75–76); that he had contributed money to the Communist Party (J.A. 79); and that he had been membership director of the Thomson-Hill Branch of the Party in 1943 (J.A. 76–77).

On the basis of this information, the Subcommittee decided to subpoena petitioner to appear before it on March 19, 1956. Prior to his appearance, petitioner's counsel, Philip Wittenberg, a New York attorney with experience in the field of civil liberties (J.A. 81–82), telephoned the Subcommittee counsel, Mr. Robert Morris, and asked what the inquiry was about and what questions would be asked petitioner. Mr. Wittenberg was informed in general terms by Mr. Morris concerning the subject matter of the inquiry, although Mr. Morris did not relate the specific evidence possessed by the Subcommittee (J.A. 67–71). Petitioner's attorney, according to Mr. Morris, did not raise any question concerning the Subcommittee's authority but "indicated that he knew the work of the Internal Security Subcommittee and what we were trying to do" (J.A. 69–70) and "then became specific when he said he knew what problems I would have on internal security" (J.A. 71).

Petitioner appeared with his counsel before the

[1] This information was a matter of public record (J.A. 101).

Subcommittee on March 19, 1956, first in executive session and then (following a recess) in a public session. At the executive session, petitioner initially disclosed his identity, occupation, and his address for the previous two years as 2239 General Taylor Street in New Orleans (J.A. 18). He denied, after consulting counsel, that Communists had been meeting at his home, but declined to state whether he was then an active Communist or whether he had been membership director of the Party's Thomson-Hill branch in 1943 (counts 1 and 2) (J.A. 19–20). Petitioner refused to answer these questions on the basis of a lengthy legal memorandum, which he submitted to the Subcommittee (J.A. 41–50). Petitioner's principal objection was that the Subcommittee was invading "my political beliefs, any other personal and private affairs, and my associational activities" protected by the First Amendment (J.A. 41–42). His remaining objections were based on separation of powers and the *ex post facto* and bill of attainder clauses of the Constitution (J.A. 44, 46–50). Petitioner expressly disclaimed any reliance on the Fifth Amendment (J.A. 20).

After petitioner's refusal to answer the two questions at the executive session, he was temporarily excused (J.A. 21). The Subcommittee then decided to take further testimony from petitioner in a public session, since it was hoped that this might lead petitioner to change his mind (J.A. 105–106). About an hour and fifteen minutes later, petitioner, with his counsel, was called before the Subcommittee in public

session. He was then advised by Mr. Morris (J.A. 21–22):

> Mr. Chairman, before commencing the interrogation of this particular witness, I would like to restate again for the record the purpose of the particular series of hearings being held by the Internal Security Subcommittee. I read now from the opening statement of the chairman:
>
> "We shall try to determine to what extent Soviet power operates through the Communist Party here and to what extent other organizations have been devised to effectuate its purposes. We shall study the structural revisions that the Communists have made in their network in order to avoid detection, and endeavor to trace the movement of individual agents through these changing structures."
>
> "Under consideration during these hearings will be the activities of Soviet agents and agencies registered with the Department of Justice and such other agents or agencies not now registered whose activities may warrant legislative action."
>
> "We shall endeavor to determine to what extent this Soviet activity here is calculated to contribute to Soviet expansion abroad and to what extent it is working to undermine the structure and composition of our own Government here, as the facts bearing on these issues are gathered in the public record of this subcommittee which will enable it to make recommendations or determinations as to whether the Internal Security Act of 1950 and other existing law should be repealed, amended or revised, or new laws enacted."

> This witness is being called here this afternoon, Senator, in the course of that particular set or series of hearings.

Petitioner described his duties as television program director for a television station in New Orleans, as well as his previous employment in New York City and elsewhere (J.A. 22–32). The Subcommittee counsel, Mr. Morris, then stated (J.A. 32):

> Mr. Chairman, this committee has been informed that Mr. Liveright and his wife were active in the Communist Party of New York City, and that at the time and date they moved to the South, they were formally asked by their Communist Party associates to keep away from formal associations with the Communist Party at that time in their activities.
>
> * * * * *
>
> The purpose of subpoenaing this witness and asking him the following questions is to determine to what extent Mr. Liveright's activities have been carried out in New Orleans in the framework of the Communist Party and to what extent they have been carried out in some other framework.

Petitioner refused, even after being ordered by the Chairman, to answer whether he was then or had ever been a Communist (counts 3 and 4) (J.A. 32–33). His refusals were based on the written memorandum previously submitted to the Subcommittee—"on the grounds that, as it states in the objection, this is an inquiry into my political beliefs" (J.A. 32–33). Thereupon the Chairman explained to petitioner (J.A. 33):

> The question, Mr Liveright, is very pertinent. We are attempting to see what amend-

ments are needed to the Internal Security Act. In addition, and as a part of that, we are tracing the activities of the Communist Party in this United States.

Our information is, sir, that you were sent South and placed there with your wife on a mission for the Communist Party, and were told by your superiors not to become involved with a Communist cell that was a professional group in the city of New Orleans, but the word was used by your superiors to stay clean.

Now, is that true? Were you sent on a mission for the Communist Party into the South? [Count 5]

After consultation with counsel, petitioner stood "on the objection that I have already submitted," but added "that the information which you have, the purport of the information you have asked me about, is completely erroneous" (J.A. 33). Petitioner refused to explain what he meant, and after being directed by the Chairman to answer, persisted in his refusal to answer the question on the basis of his previously submitted objection (J.A. 34).

Upon being asked the questions forming the basis of counts 6, 7, and 8—whether he had been "affiliated with a Communist cell in the city of New Orleans, composed of professional people"; whether Communist meetings had been held in his home at 333 Ware Street in New Orleans; and whether he had been "at one time membership director of the Thomson-Hill branch of the Communist Party"—petitioner refused to answer on the basis of his previous objection (J.A. 34). He persisted in his refusals after being given

separate directions to answer by the Chairman (J.A. 34–35).

The Chairman then pointed out (J.A. 36):

> Mr. Liveright, the Communist movement, with which we have information that you are affiliated, sir, in a conspiracy against your country. It is a conspiracy which seeks to overthrow your country. We have information, sir, and we desire to know how this conspiracy is financed, that you have given money to the Communist Party on various occasions. State whether that is true or untrue. [Count 9]

Petitioner refused to answer the question "on the same grounds," and persisted in his refusal after the Chairman directed him to answer the question (J.A. 36). The Chairman stated that petitioner had "the opportunity now to help [his] country by just frankly answering the questions and telling us the truth, to enable us * * * to draft legislation to protect the welfare and the safety of our country" (J.A. 36–37).

Petitioner refused on personal grounds to answer "did you and your wife rent a post-office box in White Plains, N.Y." (count 10) (J.A. 37). He refused on the grounds given in his statement and because "I do not feel * * * that answering questions which probe my personal life as being of any help to society or my country or anybody else * * *" (J.A. 37–38).

Petitioner then refused to answer whether he had attempted to "rent a post-office box in White Plains, N.Y., under the name of the Westchester County Committee for Ethel and Julius Rosenberg" (count 11), whether he had sent his children away from his

"home, in order to have a meeting in your home of a Communist cell, and you did not want your children to see the people in the city of New Orleans who belonged to this cell" (count 12); when he joined the Communist Party (count 13); and whether he was told by "the Communist leadership in New York after you affiliated, to stay clean in New Orleans" (count 14) (J.A. 38–40). He gave as his basis for refusal the objection which he had previously submitted.

SUMMARY OF ARGUMENT

I

The resolution establishing the Senate Subcommittee on Internal Security is sufficiently clear, at least together with its legislative history, to authorize the Subcommittee to investigate Communist activities.

A. In *Barenblatt* v. *United States,* 360 U.S. 109, this Court, although holding that Rule XI of the House of Representatives, together with its legislative history, authorized the Un-American Activities Committee to investigate Communist activities, indicated that the rule in itself was too vague to confer this authority. The language of Senate Resolution 366, however, which is the Subcommittee's authorizing resolution, is considerably clearer. Clauses (1) and (2) of the resolution specifically authorize the Subcommittee to investigate the "administration, operation, and enforcement of" the Internal Security Act of 1950 and other internal security laws. The only possible vagueness in clause (3), which most nearly corresponds to Rule XI, is its use of the phrase "subversive activities." However, this term is limited

by its context: it follows immediately after the reference in clause (1) to the Internal Security Act of 1950, which describes subversive activities in considerable detail, and it is followed by the limiting phrase, "including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence." This Court has held that in Congressional resolutions "[t]he meaning of the general language employed is to be confined to acts belonging to the same general class as those specifically authorized." *Reed* v. *County Commissioners*, 277 U.S. 376, 389.

Since the strict standards of definiteness applicable to criminal statutes are inapplicable to resolutions establishing Congressional committees, and since the resolution here in issue compares favorably from the standpoint of definiteness with resolutions establishing other Congressional committees, the language of Senate Resolution 366 is in itself sufficiently clear to authorize this investigation.

B. In any event, even if the language of Senate Resolution 366 is not sufficiently clear, on its face, to authorize the Subcommittee to investigate Communist activities, this Court in *Barenblatt* held that the authority granted by a Congressional resolution could be ascertained by examining its legislative history. Just as the House Committee on Un-American Activities, the Senate, well aware of the Subcommittee's repeated investigation of various aspects of

Communist activities, has steadily continued this Subcommittee and supported its activities with substantial appropriations. Thus, as in *Barenblatt*, the "'persuasive gloss of legislative history' * * * shows beyond doubt" that the Senate gave the Subcommittee "pervasive authority to investigate Communist activities in this country" (360 U.S. at 118).

II

A. Petitioner claimed for the first time at his trial that, under the Legislative Reorganization Act of 1946, the Subcommittee could not properly hold the hearing at which he appeared, since the Subcommittee had not received permission of the Senate to hold a hearing while the Senate was in session and the executive session had not been authorized by the parent Judiciary Committee. These contentions, however, are not available to petitioner for objections to the procedures followed by a Congressional committee must be raised before the committee. *E.g., United States* v. *Bryan*, 339 U.S. 323, 333; *Barenblatt* v. *United States*, *supra*, 360 U.S. at 123–124. If petitioner had made these objections to the Subcommittee, it could easily have met them by obtaining leave to hold the hearing from the Senate while it was in session or by simply holding the hearing when the Senate was not in session, and by either having the Judiciary Committee authorize the executive session or repeating the questions which petitioner refused to answer during the executive session at a public session.

B. Even if petitioner had made his objections be-

fore the Subcommittee, they would be without merit. The requirement in the Legislative Reorganization Act that committees obtain permission from the House or Senate to hold hearings while they are in session was enacted to assist Congress in securing the attendance of its members, not to confer rights on witnesses. Moreover, Senate Resolution 366, which was passed subsequent to the Legislative Reorganization Act of 1946, specifically authorizes the Subcommittee "to sit and act * * * during the sessions * * * of the Senate * * *."

While the executive session was apparently not authorized by the Judiciary Committee as the Legislative Reorganization Act requires, it is doubtful that the Act confers on witnesses the right to refuse to answer because such permission has not been obtained. In any event, only two of the counts involve questions asked at the executive session; the other twelve counts arose from questions asked at a public session. Since petitioner was given a general sentence which was less than he could have received on any one count, his conviction must be affirmed if any count is valid.

III

For the same reasons stated in our brief in *Shelton* v. *United States*, No. 9, this Term, pp. 48–49, the Subcommittee's investigation did not violate the First Amendment.

IV

Petitioner cannot excuse his refusal to answer by the alleged lack of pertinency of the questions.

A. Petitioner made no objection before the Subcommittee to the pertinency of the questions. Therefore, as we have shown in our brief in *Shelton, supra,* pp. 25–29, he cannot claim that the Subcommittee failed to apprise him of the subjects under inquiry or the pertinency of the questions to that subject.

Moreover, petitioner was clearly apprised by the Subcommittee of the subjects under inquiry: the organization of the Communist Party, its activities in the United States generally, and, in particular, the Party's activities in the South. The pertinency to these subjects of twelve out of the fourteen questions involved here—which included whether petitioner was then or had ever been a Party member—was clear on their face.

Petitioner claims that the Subcommittee's only subject under inquiry was Communist activity generally and that this subject is too broad to constitute a proper subject under inquiry for the purposes of 2 U.S.C. 192. Aside from the fact that the Subcommittee actually narrowed its particular subject under inquiry to Communist activities in the South, this Court in *Watkins* v. *United States,* 354 U.S. 178, and *Barenblatt* did not lay down any substantive rule that Congressional committees must confine their investigations to narrowly defined topics. Rather, it held only that a committee, on request of the witness, must state clearly what the subject under inquiry is.

B. The government proved, as 2 U.S.C. 192 requires, that the questions petitioner refused to answer were pertinent to the subjects under inquiry. By introducing the transcript of the hearings, the

government established the three subjects under inquiry described above. As we have noted, twelve of the fourteen questions were on their face pertinent to these subjects. The government showed, through oral testimony, that the other two questions were also pertinent.

V

Petitioner claims that he was entitled to dismissal of the indictment or at least a hearing because of the bias of government employees who were on the grand jury. As we have shown in our brief in *Shelton, supra*, pp. 62–76, a defendant cannot challenge an indictment because of the bias of grand jurors unless he can show specific and convincing evidence of strong bias in individual grand jurors. Here, as in *Shelton*, petitioner made no allegations with respect to individual grand jurors and did not even state any specific facts showing bias among government employees generally.

VI

Petitioner contends that the indictment was required to specify the subjects under inquiry and the pertinency of the questions to those subjects, and to allege that petitioner's refusal to answer was wilful. As shown in our brief in *Shelton, supra*, pp. 78–83, under Rule 7(c) of the Federal Rules of Criminal Procedure and the decisions of this Court and the courts of appeals, an indictment need not specify the subject under inquiry. For the same reasons, it need not provide the reasoning underlying the allegation that the questions were pertinent.

Where, as here, wilfulness is an element of the case, it cannot be ignored in an indictment. It can, however, be alleged either in terms or in words of similar import. The allegation here that petitioner "unlawfully" refused to answer is sufficient to allege that the refusal was wilful in the sense of deliberate and intentional. This Court has held that such a refusal violates 2 U.S.C. 192. *Quinn* v. *United States*, 349 U.S. 155, 165.

VII

Petitioner was not deprived of a fair trial by the trial court's denial of his motion to subpoena the Subcommittee's files and its refusal to allow him to ask certain questions on cross-examination of the Subcommittee counsel concerning the information on the basis of which the Subcommittee subpoenaed petitioner. It is clear that petitioner was seeking to obtain confidential information and the identity of confidential informants which he was not permitted to have.

A. The reason petitioner gave the trial court for subpoenaing the Subcommittee's files was to show that it already had all the information it sought from petitioner and therefore that subpoenaing petitioner had no legislative purpose. But even if petitioner could have shown that the Subcommittee had all the information petitioner could give—which seems impossible, for it is impossible to know what questions the Subcommittee would have asked if petitioner had cooperated or what he would have answered—the Subcommittee still could properly confirm the information

it already had. Petitioner now claims, however, that he needed to have the files to show that the Subcommittee had no basis to subpoena him. This contradicts his earlier claim that the Subcommittee already had all the information it sought to obtain from him.

In any event, we submit that a witness who refuses to answer questions asked by a Congressional committee is not entitled to the disclosure of the confidential files of the committee before he can be punished for contempt. If Congressional committees were required to disclose confidential information in order to enforce their directions to witnesses, the result would be to interfere seriously with Congressional investigations. While this Court indicated in *Barenblatt* that witnesses could not be called unless the committee had reasonable basis for believing that they had information of value in the investigation, it did not suggest that the sufficiency of the committee's information and reasons for subpoenaing a witness would be subject to plenary judicial review. We submit that the Court intended, at most, to require only that Congressional committees present information showing some reasonable basis for their decision to subpoena a witness.

B. Petitioner sought on cross-examination of the Subcommittee counsel to obtain the name of a confidential informant in order to show that the Subcommittee had no probable cause to subpoena petitioner. Trial courts have, of course, broad discretion over the scope of cross-examination. For the same reasons that the trial court refused to grant petitioner's motion to subpoena the Subcommittee's files, the court properly

exercised its discretion in refusing to allow cross-examination in this narrow area.

ARGUMENT

Petitioner was convicted of contempt of Congress for refusing to answer fourteen questions asked him by a Congressional committee concerning his activities in the Communist Party. Since petitioner was given a general sentence and a fine on all fourteen counts which was less than the maximum authorized by 2 U.S.C. 192 under any one count, the judgment below must be affirmed if any one of the counts is upheld. *E.g., Barenblatt* v. *United States*, 360 U.S. 109, 115. We submit, however, that petitioner was properly convicted on each of the fourteen counts.

I

THE RESOLUTIONS ESTABLISHING AND CONTINUING THE SENATE SUBCOMMITTEE ON INTERNAL SECURITY AUTHORIZED THE SUBCOMMITTEE TO INVESTIGATE COMMUNIST ACTIVITIES IN THE UNITED STATES

Petitioner erroneously contends (Pet. Br. 34) that the enabling resolution of the Subcommittee is so vague that the Subcommittee is without constitutional power to compel testimony from petitioner. The Senate authorized the creation of the Internal Security Subcommittee in 1950 by passage of Senate Resolution 366, 81st Cong., 2d Sess. This resolution, which has been readopted in subsequent sessions,[1] authorized the Committee on the Judiciary or any duly authorized subcommittee thereof to make a complete and continuing study and investigation of:

[1] Senate Resolution 174, 84th Cong., 2d Sess. was operative when petitioner testified.

> (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence.

We submit (1) that the language of this resolution is sufficiently clear to authorize the Internal Security Subcommittee to investigate Communist activities in the United States and (2) even if the language is considered too vague to establish this authority alone, the history of the resolution demonstrates that Congress conferred this authority on the Subcommittee. Since, as we will show (pp. 37–41), the Subcommittee was investigating the organization of the Communist Party, Communist activities in the United States generally, and, more particularly, Communist activities in the South, this particular investigation was well within the Subcommittee's authority.

A. THE LANGUAGE OF SENATE RESOLUTION 366 PROPERLY AUTHORIZED THE SUBCOMMITTEE TO INVESTIGATE COMMUNIST ACTIVITIES

In *Barenblatt* v. *United States*, 360 U.S. 109, this Court, although holding that Rule XI of the House of Representatives, together with its legislative his-

tory, authorized the Un-American Activities Committee to investigate Communist activities (*id.* at 117–123), indicated that the rule in itself was too vague to confer this authority. *Id.* at 117; see also *Watkins* v. *United States*, 354 U.S. 178, 201–202. Rule XI authorizes the Un-American Activities Committee to make investigations of (H. Res. 5, 83d Cong., 1st Sess.):

> (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

We believe that the language of Senate Resolution 366 is considerably clearer than Rule XI and therefore conferred sufficient authority on the Subcommittee to investigate various aspects of Communist activities.

Clauses (1) and (2) of Senate Resolution 366 authorize the Subcommittee to make a "complete and continuing study and investigation" of the "administration, operation, and enforcement of," respectively, "the Internal Security Act of 1950" and "other laws relating to espionage, sabotage, and the protection of the internal security of the United States." The area of the Subcommittee's investigative authority thus delineated is sufficiently definite to serve as a valid

Congressional resolution, and petitioner does not seriously dispute the point (see Pet. Br. 35). "Bare recital of this portion of the resolution," as the court below observed in *Sacher* v. *United States*, 252 F. 2d 828, 832 (C.A. D.C.), reversed on other grounds, 356 U.S. 576, "discloses that it is not subject to the same criticism as was directed at the House Resolution under which Watkins was questioned. It sufficiently describes 'the kind of investigation that the committee was directed to make.'"

Clause (3), which is the only clause whose language petitioner specifically attacks (Pet. Br. 35), is the portion of Senate Resolution 366 which most nearly corresponds to House Rule XI. But Senate Resolution 366 does not include either the term "un-American" or the phrase "principle of the form of government as guaranteed by our Constitution"—whose indefiniteness this Court alluded to in *Watkins* (354 U.S. at 202). The only real point of similarity between Rule XI and this clause of Senate Resolution 366 is the use in each of the word "subversive." The setting and context in which the phrase "subversive activities" is used in clause (3), however, give it a more defined and specific content than the term "subversive * * * propaganda" has on the face of House Rule XI. First, the phrase "subversive activities" in clause (3) comes immediately after the reference in clause (1) to the "Internal Security Act of 1950"—the first Title of which is denominated the "Subversive Activities Control Act of 1950" (Section 1(a), 64 Stat. 987) and which describes in consider-

able detail the subversive activities with which Congress was concerned (Section 2, 64 Stat. 987).

Second, the term "subversive activities" is qualified in clause (3) by the phrase, "including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of "the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence." The effect of the words "including, but not limited to" does not appreciably expand the concept of "subversive activities" beyond the confines of the specific subjects itemized following that phrase. For this Court has held that in Congressional resolutions "[t]he meaning of the general language employed is to be confined to acts belonging to the same general class as those specifically authorized." *Reed* v. *County Commissioners,* 277 U.S. 376, 389. Applying this principle to the third clause of Senate Resolution 366, the meaning of the phrase "subversive activities" is confined to activities at least of the "same general class" as "espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."[8] These words and phrases have been

[8] Thus, there is no merit to the claim of the petitioner in *Price* v. *United States*, No. 12, this Term (Pet. Br. in No. 12, p. 36) that "the Senate has expressly provided that the 'subversive activities' to be investigated are *not* limited to 'movements seeking to overthrow, the Government of the United States by force and violence'" (emphasis in original).

used and their meaning described in numerous federal statutes (including the detailed legislative findings concerning the world Communist movement in Section 2 of the Internal Security Act). For this reason, and because authorizing resolutions for legislative investigations have never been considered to require the narrow, defined language of a criminal statute (see *infra*, pp. 24–25), there is no basis, we believe, for holding that the third clause of Senate Resolution 366 is invalid.[4]

In any event, even if it be assumed, *arguendo*, that the term "subversive activities" in the third clause of Senate Resolution 366 is lacking in the specificity desirable in an enabling resolution, the clarity and specificity of the remainder of the resolution leave no real doubt (as *Sacher* v. *United States*, *supra*, 252 F. 2d at 831–832, pointed out) of the area of authority conferred by that resolution on the Subcommittee.

The strict standards of definiteness applicable to criminal statutes, it is to be remembered, have never been thought applicable to resolutions establishing Congressional committees and defining their powers. The demarcation of the areas of authority of such committees is in the nature of things required to be stated in general terms. If the resolution establishing

[4] In *Watkins*, this Court referred to the expression "subversion and subversive propaganda" (as orally used by the Chairman of the Subcommittee of the Committee on Un-American Activities in announcing the subject of an investigation) as "at least as broad and indefinite as the authorizing resolution of the Committee, if not more so" (354 U.S. at 214). But this phrase, unlike the phrase "subversive activities" in the authorizing resolution in the case at bar, lacked a contextual setting clothing it with meaning and content.

the Senate Internal Security Subcommittee is fatally indefinite, then so, it would seem, are the authorizing resolutions—which are cast in equally if not more indefinite terms—of the Senate Committees on the Armed Services, Interstate and Foreign Commerce, and Appropriations, as well as the resolutions creating numerous select and special committees which have been established by Congress from time to time. See the dissenting opinion of Mr. Justice Clark in *Watkins*, 354 U.S. at 220–222. "Yet no one", as Mr. Justice Clark noted, "has suggested that the powers granted [these other committees] were too broad" (*id.* at 222).

B. IN ANY EVENT, THE LEGISLATIVE HISTORY OF SENATE RESOLUTION 366 SHOWS THE AUTHORITY OF THE SUBCOMMITTEE TO INVESTIGATE COMMUNIST ACTIVITIES

It was necessary in *Barenblatt* to examine the legislative gloss of House Rule XI only because the Court "grant[ed] the vagueness of the Rule" (360 U.S. at 117). The more precise words of the Senate Resolution 366, we have shown, make it unnecessary to make such an examination here. But, if the language of Senate Resolution 366 is not clear enough in itself to give the Subcommittee the authority to investigate Communist activities, the " 'persuasive gloss of legislative history' * * * shows beyond doubt," just as in *Barenblatt*, that the Senate gave the Subcommittee "pervasive authority to investigate Communist activities in this country" (360 U.S. at 118).

In finding in *Barenblatt* that the gloss of legislative history clearly showed that the House of Representatives had given the Un-American Activities Committee authority to investigate Communist activities, the Court looked to two kinds of evidence. First, it found

that "the Committee has devoted a major part of its energies to the investigation of Communist activities" and conducted investigations of such activities in numerous fields of American life (360 U.S. at 118–119). And, second, the Court found that "the House has steadily continued the life of the Committee at the commencement of each new Congress; it has never narrowed the powers of the Committee * * *; and it has continuingly supported the Committee's activities with substantial appropriations" (360 U.S. at 119–120).

The same evidence can easily be mustered to show that the Senate has given the Internal Security Subcommittee pervasive authority to investigate Communist activities. To begin with, the Subcommittee has always devoted most of its energies to investigating Communist activities.[5] Since its inception, the Subcommittee has conducted investigations into such alleged Communist activities as espionage, misuse of passports, propaganda, and infiltration into labor, religion, defense, industry, education, youth organizations, and the government.[6]

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[5] See Cumulative Index to Published Hearings and Reports of the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, 1951–1955 (Committee Print, 1957). See also the hearings and reports cited in note 6, *infra*.

[6] Hearings, Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate: *Espionage Activities of Personnel Attached to Embassies and Consulates under Soviet Domination in the United States*, 82d Cong., 1st and 2d Sess. (1951, 1952); *Communist Use and Abuse of United States Passports*, 85th Cong., 2d Sess. (1958); *Unauthorized*

Moreover, the Senate has continued the life of the Subcommittee at each new Congress. S. Res. 7, 82d Cong., 1st Sess. (1951); S. Res. 198, 82d Cong., 1st Sess. (1951); S. Res. 314, 82d Cong., 2d Sess. (1952); S. Res. 46, 83d Cong., 1st Sess. (1953); S. Res. 172, 83d Cong., 2d Sess. (1954); S. Res. 49, 84th Cong., 1st Sess. (1955); S. Res. 58, 84th Cong., 1st Sess. (1955); S. Res. 209, 84th Cong., 2d Sess. (1956); S. Res. 174, 84th Cong., 2d Sess. (1956); S. Res. 58, 85th Cong., 1st Sess. (1957); S. Res. 233, 85th Cong., 2d Sess. (1958); S. Res. 378, 85th Cong., 2d Sess. (1958); S. Res. 59, 86th Cong., 1st Sess. (1959); S. Res. 170, 86th Cong., 1st Sess. (1959); S. Res. 242, 86th Cong., 2d Sess. (1960); S. Res. 49, 87th Cong.,

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Travel of Subversives Behind the Iron Curtain on United States Passports, 82d Cong., 1st Sess. (1951); *Communist Underground Printing Facilities and Illegal Propaganda*, 83d Cong., 1st Sess. (1953); *Communist Propaganda Activities in the United States*, 82d Cong., 1st Sess. (1952); *Scope of Soviet Activity in the United States (Labor)*, 85th Cong., 1st Sess. (1957), Parts 68, 77, 78, 80, 82, 88, 89; *Subversive Influence in Certain Labor Organizations*, 83d Cong., 1st and 2d Sess. (1953, 1954); *Communist Domination of Union Officials in Vital Defense Industry—International Union of Mine, Mill, and Smelter Workers*, 82d Cong., 2d Sess. (1952); *Subversive Control of the United Public Workers of America*, 82d Cong., 1st Sess. (1951); *Communist Controls on Religious Activity*, 86th Cong., 1st Sess. (1959); *Protection of Defense Communications*, 86th Cong., 2d Sess. (1960); *Subversive Infiltration in the Telegraph Industry*, 82d Cong., 1st and 2d Sess. (1951, 1952); *Subversive Infiltration of Radio, Television, and the Entertainment Industry*, 82d Cong., 1st and 2d Sess. (1951, 1952); *Subversive Influence in the Educational Process*, 82d Cong., 2d Sess., and 83d Cong., 1st Sess. (1952, 1953); *Communist Tactics in Controlling Youth Organizations*, 82d Cong., 1st and 2d Sess. (1951, 1952); *Interlocking Subversion in Government Departments*, 83d Cong., 1st Sess. (1953).

1st Sess. (1961). The authority of the Subcommittee has never been narrowed since its inception in 1950. And Congress has continually supported the Subcommittee's activities with substantial appropriations. See the resolutions cited above.[1]

II

PETITIONER CANNOT CLAIM FOR THE FIRST TIME AT HIS TRIAL THAT UNDER THE LEGISLATIVE REORGANIZATION ACT OF 1946 THE SUBCOMMITTEE COULD NOT PROPERLY HOLD THE HEARING AT WHICH HE APPEARED. MOREOVER, THAT ACT DOES NOT PROVIDE GROUNDS ON WHICH TO REVERSE HIS CONVICTION

Petitioner asserts (Pet. Br. 35–42) that his conviction should be reversed on the ground that the Subcommittee, when he appeared before it, was not a competent tribunal because the Legislative Reorganization Act of 1946 (see Pet. Br. 49–50) provides (1) that "[n]o standing committee of the Senate • • • shall sit, without special leave, while the Senate • • • is in session," and (2) that all hearings conducted by Senate committees "shall be open to the public, except executive sessions for marking up bills or for

[1] Petitioner in *Price* v. *United States*, *supra*, relies (Pet. Br. in No. 12, p. 35) on *United States* v. *Peck*, 354 F. Supp. 603, 608–610 (D. D.C.), which held that Senate Resolution 366 was too indefinite to support an investigation similar to that involved here. But that case, which was decided before *Barenblatt*, construed this Court's decision in *Watkins* to invalidate House Rule XI's authorization of the House Un-American Activities Committee and held that Senate Resolution 366 was no more clear. In *Barenblatt*, however, this Court held that House Rule XI authorized the Un-American Activities Committee to investigate Communist activities. Therefore, the premise on which the *Peck* decision was based no longer exists.

voting or where the committee by a majority vote orders an executive session." These contentions are without merit.

A. PETITIONER FAILED TO RAISE THESE ISSUES AT THE HEARING AND THEREFORE COULD NOT RAISE THEM AT HIS TRIAL

First, we submit that these contentions are not available to petitioner because he made no objection on either ground at the time he appeared before the Subcommittee. Instead, his lengthy statement of legal argument and authorities (J.A. 41–50) relied entirely on various constitutional privileges—the First Amendment, separation of powers, and the *ex post facto* and bill of attainder clauses (see *supra*, p. 6).

It is well established that a witness before a Congressional committee is not entitled to raise objections at his trial, concerning the procedures followed by the committee, which he has not raised before the committee itself. See the discussion in our brief in *Shelton* v. *United States*, No. 9, this Term, at pp. 25–29. Applying this principle to the instant case, it is apparent that the Subcommittee could have easily met petitioner's objections if they had been made to it—by obtaining leave to hold the hearing while the Senate was in session or by holding the hearing when the Senate was not in session, and by either having the Judiciary Committee authorize the executive session by majority vote or repeating the questions which petitioner refused to answer during the executive session at a public session. In these circumstances, as the Court said in *United States* v. *Bryan*, 339 U.S. 323, 333: "To deny the Committee the opportunity

to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes."

Petitioner suggests (Pet. Br. 38–39) three grounds for his contention that it was not necessary to raise these issues before the Subcommittee. First, he cites *Christoffel* v. *United States*, 338 U.S. 84, 88, for the proposition that "[i]n a criminal case affecting the rights of one not a member [of the Committee], the occasion of trial is an appropriate one for petitioner to raise the question." The question involved in *Christoffel*, however, was whether a perjury conviction should be reversed on the ground of the lack of a quorum. The lack of a quorum involves a far more basic issue than whether a hearing has been held while the Senate was in session without the Senate's permission or whether an executive session has been held by a subcommittee without the parent committee's permission. It can perhaps be said that unless a quorum is present a hearing is being held by individual Congressmen, not by a Congressional committee. Certainly, it cannot be suggested—assuming that the Subcommittee here violated the Legislative Reorganization Act—that it was not acting as a committee of the Senate. Furthermore, this Court in the *Bryan* case (which also involved the issue of a quorum) distinguished *Christoffel* on the ground that the latter involved a conviction under a statute which expressly punished only perjury before a "competent tribunal" (339 U.S. at 329). In contrast, the Court emphasized in *Bryan*, the contempt-of-Congress statute (R.S. 102) has no such requirement (*ibid.*): "It does not contemplate some affirmative act which is made punishable only if

performed before a competent tribunal, but an intentional failure to testify or produce papers, however the contumacy is manifested." Petitioner here was punished under 2 U.S.C. 192, which is the successor statute to R.S. 102, and which likewise punishes any intentional failure to testify.

Petitioner next contends that the *Bryan* case distinguished the situation where a witness refuses to give oral testimony rather than to produce documents. It is true that the Court stated that the decision *might* be different (although it did not so decide) when a witness refuses to testify before a committee without a quorum since a witness has more cause to fear that some committee members, unrestrained by a majority, will exceed their powers than a person who is merely required to turn over documents (339 U.S. at 332, note 8). We submit, however, that there is little, if any, difference. If no quorum is present, a witness called to testify can make this objection at the outset and then refuse to answer any questions until a quorum appears. He is therefore in little danger of being abused by a minority of the committee's members. In any event, a quorum was present when petitioner testified. If the Subcommittee had received permission from the Senate to hold the hearing while the Senate was in session and if it had either held the executive session in public or received permission to hold an executive session from the Judiciary Committee, there is no reason to believe that more members of the Subcommittee would have been present. And if the hearings had been held while the Senate was not in session, while more members might have appeared, petitioner had no right that they attend.

Lastly, petitioner argues that, while the lack of a

quorum is obvious, a witness cannot ascertain by visually looking at a committee that it has not been authorized by the Senate to hold a hearing while the Senate is in session or that the parent committee has not authorized an executive session. But petitioner could have readily ascertained whether such authority had been given by merely asking the Subcommittee. He cannot escape his obligation to raise his objections before the Subcommittee through his own negligence.

B. IN ANY EVENT, PETITIONER'S CONTENTIONS ARE WITHOUT MERIT

As for petitioner's first contention, Section 134(a) of the Legislative Reorganization Act of 1946* provides that any standing committee of the Senate, including any subcommittee, is authorized to hold hearings at any time even though sessions of the Senate are in progress. Section 134(c), relied upon by petitioner, provides that no standing committee of either branch of Congress, except the Committee on Rules of the House, shall sit without leave of such branch when the latter is in session. Read together, it appears that Section 134(a) is a jurisdictional grant of authority to committees and subcommittees, while Section 134(c) is a procedural limitation for the benefit of Congress. Thus, we submit, Section 134(c) was not intended to give rights to witnesses; it was enacted to assist Congress in securing the attendance of its members.

Even if Section 134(c) is construed to confer rights on witnesses, there was no violation of petitioner's rights because Senate Resolution 366 clearly

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*Act of August 2, 1946, c. 753, 60 Stat. 812, Title I, Section 134, 2 U.S.C. 190b.

authorized the hearing. Resolution 366, which was passed in 1950 and readopted by the Senate in subsequent sessions (after the Legislative Reorganization Act of 1946 was passed) provides that the Internal Security Subcommittee of the Judiciary Committee "is authorized to sit and act at such places and times during the sessions, recesses, and adjourned periods of the Senate * * * as it deems advisable." Thus, the Subcommittee was clearly authorized—in the words of Section 134(c) was given "special leave"—to sit at any time, even while the Senate was in session.

As for petitioner's second contention, Section 133(f) of the Legislative Reorganization Act of 1946 requires that all hearings by standing committees or their subcommittees shall be public unless the committee authorizes an executive session by majority vote. This requirement, unlike that in Section 134 (c), may have been intended to protect the rights of witnesses, but it is nevertheless doubtful that it allows a witness to refuse to answer because permission for an executive session had not been obtained. In any event, while it appears that the executive session at which petitioner testified was not authorized by majority vote (J.A. 96), only counts 1 and 2 arose from questions asked during this session. Counts 3 through 14 arose from questions asked at the public session, which was not required to be authorized by majority vote. And since petitioner was given a general sentence which was less than he could have received on any one count, his conviction must be affirmed if any count is valid. *E.g., Barenblatt* v. *United States, supra,* 360 U.S. at 115.

III

THE SUBCOMMITTEE'S INVESTIGATION DID NOT VIOLATE THE FIRST AMENDMENT

Petitioner contends (Pet. Br. 35), relying entirely upon the brief of the petitioner in *Shelton* v. *United States*, No. 9, this Term, pp. 29–57, that the Subcommittee's investigation violated his rights under the First Amendment. As we have shown in our brief in *Shelton*, pp. 48–49, this contention is without merit.

In addition, we submit that the two principal arguments under the First Amendment made by the petitioner in *Shelton* are even more clearly inapplicable to the present case. First, the petitioner in *Shelton* claims (Pet. Br. in No. 9, pp. 53–56) that the Subcommittee was not investigating Communist activities in news media but the news media themselves and, more exactly, the New York Times. While we have shown in our brief in *Shelton*, pp. 49–50, that this claim is erroneous, it is without even the slightest factual support in this case. Unlike in *Shelton*, the questions which petitioner refused to answer were not directly related to Communist activity in the news media field; for the subject under inquiry which was described to petitioner at the hearings did not concern news media at all. As we shall see (pp. 37–41), the Subcommittee stated to petitioner that it was investigating the organization of the Communist Party, Communist activities in the

United States generally, and, more particularly, petitioner's Party activities in the South.*

Second, the petitioner in *Shelton* maintains (Pet Br. in No. 9, pp. 29–53) that the Subcommittee did not have probable cause to subpoena him. While we have shown in our brief in *Shelton*, pp. 50–62, that the Subcommittee did have a reasonable basis for believing that the witness had information of considerable value to it, this is even clearer in the instant case. For, as we have described in the Statement, *supra*, pp. 4–5, the Subcommittee had abundant and detailed information at the time it subpoenaed petitioner that he was a member of the Communist Party who was participating in numerous Party activities.

IV

THE QUESTIONS PETITIONER REFUSED TO ANSWER WERE PERTINENT TO THE SUBJECTS UNDER INQUIRY AND THIS PERTINENCY WAS MADE CLEAR TO PETITIONER BY THE SUBCOMMITTEE

Petitioner contends (Pet. Br. 16–31) that (1) the Subcommittee failed to apprise him, when he appeared before it, of the subject under inquiry and of the pertinency to this subject of the questions he refused to answer, and that (2) the government failed to prove at his trial what was the subject under inquiry

* The Subcommittee counsel did testify at the trial that one of the purposes of the investigation was to discover Communist infiltration of news media. The questions asked petitioner do not directly relate to this subject except for the preliminary questions whether petitioner was or had been a Communist (see *infra*, p. 45). Presumably, if petitioner had cooperated with the Subcommittee by answering its questions, subsequent questions would have explored this subject.

and to establish the pertinency of the questions involved in the indictment to this subject. Both contentions are untenable.

A. PETITIONER FAILED TO CHALLENGE THE PERTINENCY OF THE QUESTIONS WHEN HE APPEARED BEFORE THE SUBCOMMITTEE AND THEREFORE CANNOT CLAIM AT HIS TRIAL THAT HE WAS NOT APPRISED OF THEIR PERTINENCY. IN ANY EVENT, HE WAS APPRISED OF THEIR PERTINENCY

1. As we have argued in our brief in *Shelton* v. *United States, supra*, pp. 25–29, a witness before a Congressional committee cannot claim that the committee has failed to apprise him of the subject under inquiry and the pertinency of the questions to this subject, unless he raises the issue of pertinency before the committee itself. *Barenblatt* v. *United States, supra*, 360 U.S. at 123–124; *Deutch* v. *United States*, 367 U.S. 456, 469. He cannot wait until trial to raise an objection which the committee could easily remedy.

Before the Subcommittee petitioner failed to object to the questions on ground of pertinency. His lengthy statement of legal argument and authorities (J.A. 41–50), which was obviously prepared by or at least with the help of petitioner's counsel, attempted to justify his refusal to answer entirely on constitutional grounds (see the Statement, *supra*, p. 6). The only suggestion of an objection to pertinency is the statement that petitioner "might wish to * * * challenge the pertinency of the question to the investigation" (J.A. 48). Considering the very same statement in a substantially similar legal memorandum,[10]

[10] See the record in *Barenblatt* v. *United States*, No. 35, Oct. Term, 1958, pp. 227–235.

this Court held in *Barenblatt* that the issue of pertinency is not properly raised by statements of a witness which "constituted but a contemplated objection to questions still unasked, and buried as they were in the context of [the witness'] general challenge to the power of the Subcommittee * * *" (360 U.S. at 124). Therefore, here, as in *Barenblatt,* the witness failed "to trigger what would have been the Subcommittee's reciprocal obligation" to explain the pertinency of the questions, and the witness is foreclosed from raising the issue for the first time in the contempt proceeding. *Ibid.*

2. In any event, no reasonable man in petitioner's situation—and certainly not one as articulate and intelligent as petitioner, who was also represented by experienced counsel—could have had any real doubt as to the subject under inquiry. Before he appeared at the executive session, the counsel who represented him at the hearing had telephoned counsel for the Subcommittee, had been informed in general terms as to the subject matter of the inquiry, and had indicated that he understood. (See *supra,* p. 5). At the brief executive session on March 19, 1956, petitioner presented a written statement of objections which revealed that he understood that the Subcommittee intended to inquire about his "political beliefs" and his "associational activities" (J.A. 41–42). As this Court stated in *Barenblatt* with regard to a substantially identical memorandum, "In light of his prepared memorandum of constitutional objec-

tions there can be no doubt that this petitioner was well aware of the Subcommittee's authority and purpose to question him as it did" (360 U.S. at 124).

It is clear, therefore, that petitioner knew, at the time he testified at the executive session, that the Subcommittee was subpoenaing him concerning Communist activities generally. He was asked and refused to answer at the executive session whether he was then an active Communist and whether he had been membership director of a specified branch of the Party in 1943 (counts 1 and 2). Just as in *Barenblatt,* where a Congressional Committee was investigating Communist activities in the field of education, the pertinency of the "questions as to [the witness'] own Communist Party affiliations * * * was clear beyond doubt" (360 U.S. at 125).

Any doubt in petitioner's mind concerning the subject under inquiry was surely cleared up when the Subcommittee counsel read to petitioner, at the public hearing, the opening statement of the Chairman at a previous public session with regard to "the purpose of the particular series of hearings" (J.A. 21). Included in the statement were these remarks (J.A. 22):

> We shall try to determine to what extent Soviet power operates through the Communist Party here and to what extent other organizations have been devised to effectuate its purposes. We shall study the structural revisions that the Communists have made in their net-

work in order to avoid detection, and endeavor to trace the movement of individual agents through these changing structures.

* * * * *

We shall endeavor to determine to what extent this Soviet activity here is calculated to contribute to Soviet expansion abroad and to what extent it is working to undermine the structure and the composition of our own Government here [in order to enable the Subcommittee to make recommendation, as to whether the Internal Security Act of 1950 * * * should be repealed, amended or revised, or new laws enacted."

After petitioner answered questions concerning his present and previous employment, Subcommittee counsel stated (J.A. 32):

Mr. Chairman, this committee has been informed that Mr. Liveright and his wife were active in the Communist Party of New York City, and that at the time and date they moved to the South, they were formally asked by their Communist Party superiors to keep away from formal associations with the Communist Party at that time in their activities.

* * * * *

The purpose of subpoenaing this witness and asking him the following questions is to determine to what extent Mr. Liveright's activities have been carried out in New Orleans in the framework of the Communist Party and to

> what extent they have been carried out in some other framework.[11]

Petitioner then refused to answer whether he was then or had ever been a Communist (counts 3 and 4). The Chairman explained (J.A. 33):

> The question, Mr. Liveright, is very pertinent. We are attempting to see what amendments are needed to the Internal Security Act. In addition, and as a part of that, we are tracing the activities of the Communist Party in the United States.
>
> Our information is, sir, that you were sent South and placed there with your wife on a mission for the Communist Party, and were told by your superiors not to become involved with a Communist cell that was a professional group in the city of New Orleans, but the word was used by your superiors to stay clean.

Thus, before petitioner finally refused to answer any of questions at the public session on which his indictment and conviction were primarily based, he was specifically told that the Subcommittee was questioning him about the Party's organization, its activ-

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[11] Petitioner suggests (Pet. Br. 18, note 6) that the statement of the Subcommittee counsel could not provide the subject under inquiry because there is no evidence that the Subcommittee had given him this authority. But the Subcommittee did not reject the subject under inquiry clearly stated by Subcommittee counsel; indeed, the Chairman immediately thereafter confirmed that this was the subject. Moreover, the Court relied heavily on statements made by employees of the committee to the witness explaining the subject under inquiry in both *Wilkinson* v. *United States*, 365 U.S. 399, 408, and *Braden* v. *United States*, 365 U.S. 431, 433, at note 3 (the "lengthy explanatory statement addressed contemporaneously to the petitioner" was made by the committee's staff director).

ities in the United States generally,"[11] and in particular about Party activities in the South."[12] Virtually all of the questions he refused to answer obviously related to these subjects. These questions, which were pertinent on their face, included whether petitioner was then or had ever been a member of the Communist Party (counts 3 and 4); whether he had been sent on a mission for the Communist Party into the South (count 5); whether he had been affiliated with a Communist cell of professional people in New Orleans (count 6); whether Party meetings had been held in his home in New Orleans (count 7); whether he had been membership director of the Party's Thomson-Hill branch (count 8); whether he had given money to th Communist Party (count 9); whether he had sent his children away from his home because a meeting of a Communist unit was being held there (count 12); when he had joined the Communist Party (count 13); and whether he was told by the Party leadership in New York "to stay clean in New Orleans" (count 14). In addition, before petitioner was asked the question involved in count 9—whether he had given money to the Communist Party—the Chairman had stated that

[11] Contrary to petitioner's contention (Pet. Br. 24), this subject was stated to petitioner in terms by the Chairman: "[W]e are tracing the activities of the Communist Party in the United States" (see *supra*, p. 40). Thus, we do not rely, as petitioner claims (see Pet. Br. 24–28), exclusively on the Chairman's opening statement, which, according to petitioner, is no more specific than the authorizing resolution (S. Res. 366, 81st Cong., 2d Sess.).

[12] Similar subjects under inquiry—Communist infiltration into basic industry in the South and Communist Party propaganda in the South—were involved in *Wilkinson* v. *United States*, 365 U.S. 399, 408, and *Braden* v. *United States*, 365 U.S. 431.

the Committee was desirous to know "how this conspiracy is financed" (J.A. 36).

Petitioner suggests (Pet. Br. 18) that the subject under inquiry stated by the Chairman was too broad, because it included all Communist activity in the United States. First, this contention would apply only to counts 1 and 2, which involve questions asked during the executive session. Before petitioner was directed to answer any of the questions at the public session, the Subcommittee counsel described a more specific area of Communist activities, within the subject of Communist activities generally, which the Subcommittee was investigating in particular, *i.e.*, Communist activities in the South (see *supra*, pp. 39–40). And, as we have noted (p. 19), the judgment below must be sustained if petitioner's conviction on any one count is valid.

Second, even as to counts 1 and 2, neither *Barenblatt* nor *Watkins* v. *United States*, 354 U.S. 178, suggests that Congressional committees must divide their investigations into various topics, each to be investigated at a separate hearing. Such a requirement would seriously interfere with the work of a committee which is attempting to investigate a large and interwoven problem such as Communist activities in the United States. For example, it may be very difficult for the committee to designate a particular hearing as Communist infiltration of the radio or of the press. Instead, *Barenblatt* and *Watkins* require only that "[u]nless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body * * * to state for the record the

subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. To be meaningful, the explanations must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it." *Watkins* v. *United States,* 354 U.S. at 214–215; see *Barenblatt* v. *United States,* 360 U.S. at 124–125. Thus, the Court required, only as a procedural rule, that committees must state clearly the subject under inquiry. It did not lay down any substantive requirement as to what subjects Congressional committees could investigate.

Moreover, the underlying rationale for the requirement that a witness be apprised of the pertinency of the questions did not require the Subcommittee to be investigating, and state to petitioner that it was investigating, a narrowly defined subject. The statute (2 U.S.C. 192) requires that the questions be pertinent, in order to prevent the punishment of a witness for refusing to answer questions which were without relevancy or importance to the committee's legislative work. The reason for punishing witnesses who refuse, without proper legal justification, to answer questions propounded by Congressional committees is that such refusal obstructs the committee in gathering information needed to consider possible legislation. If the questions are not pertinent to the subject under inquiry, then the committee has not been obstructed. The Subcommittee here involved has the authority to consider, and does consider, legislation relating to all aspects of Communist activities (see *supra,* pp. 19–28). Thus, petitioner's refusal

to answer the questions involved in counts 1 and 2 obstructed the Subcommittee in its legislative responsibility of investigating Communist activities in the United States.

If the pertinency element of 2 U.S.C. 192 is satisfied by a general subject of inquiry, such as Communist activities, the requirement that a witness be clearly apprised of the pertinency of questions is likewise satisfied if this general subject is clearly stated and the questions are obviously pertinent to this subject. The rationale for requiring that the witness be apprised of the pertinency of the questions is to allow him to decide at the time the questions are asked whether he is legally required to answer. *Watkins* v. *United States, supra,* 354 U.S. at 208–209. Here, knowing that the subject under inquiry at the executive session was Communist activities generally, petitioner was easily able to ascertain that the questions he refused to answer were pertinent.

B. THE GOVERNMENT PROVED THAT THE QUESTIONS WERE PERTINENT TO THE SUBJECTS UNDER INQUIRY

We have shown above that petitioner was apprised that the subjects under inquiry were the organization of the Communist Party, its activities generally in the United States, and, more particularly, the Party's activities in the South. We have also pointed out that twelve out of the fourteen questions on which petitioner was convicted were on their face clearly pertinent to all of these subjects (see *supra,* pp. 38, 41). Since the Government introduced the transcript of the hearings at petitioner's trial (Gov. Ex. 7), it fully

proved that these questions were in fact pertinent to the subjects under inquiry. Moreover, the testimony at petitioner's trial showed that the other two questions—whether petitioner and his wife had rented a post office box in White Plains, New York, and whether it had been rented in the name of the Westchester County Committee for Ethel and Julius Rosenberg (counts 10 and 11)—were also pertinent to the investigation of the organization of the Communist Party and of Communist activities generally. For the Subcommittee counsel testified that the Subcommittee had information that these activities were part of an attempt to raise funds for Communist purposes (see *supra,* p. 4).

In addition to the subjects under inquiry of which the Subcommittee clearly apprised petitioner, the Subcommittee counsel testified at petitioner's trial that another reason for petitioner's appearance was Communist activities in the communications media (J.A. 88, 97, 101–102). The questions petitioner refused to answer concerning whether he was or had ever been a member of the Communist Party (counts 1, 3, and 4) were clearly pertinent to this subject.

Petitioner, in attempting to show that the unanswered questions were not pertinent, emphasizes (Pet. Br. 19–20) that the Subcommittee counsel stated at petitioner's trial that the subject under inquiry, at the hearings at which petitioner testified, was Communist activities in the United States generally (see J.A. 58, 60, 86, 90, 93). We submit, however, that these statements are not inconsistent with our contention that the particularized subject under inquiry when petitioner was questioned was Communist activity in the South.

The latter subject is obviously a portion of the more general subject of Communist activities. See our brief in *Shelton, supra,* p. 34. Petitioner also seeks to draw comfort (Pet. Br. 21) from the statements of the Assistant United States Attorney at the trial that the Subcommittee has never investigated any particular subject within the scope of its authority, *i.e.* within the subject of Communist activities generally. It would seem, however, that these statements (see J.A. 58, 60) meant only that the Subcommittee had the power to investigate Communist activities generally and exercised this power even when it was investigating a particular portion of the general subject. Petitioner never indicated in the district court that there was any inconsistency between the statement of the Assistant United States Attorney and the clear proof introduced by the government.

In any event, even if the government had proved only that the sole subject under inquiry was Communist activities in general, this would have been sufficient to establish the pertinency of the questions. As we have noted above (pp. 42–44), this Court has never required that a Congressional committee have a narrowly defined subject under inquiry. Instead, it is sufficient that the committee have a subject under inquiry which is within the investigatory authority given it by the Senate or House of Representatives. In answer, petitioner contends (Pet. Br. 24–28) that the *Watkins* and *Barenblatt* cases hold that the full scope of the Subcommittee's authority (Senate Resolution 366) is too vague to be a subject under inquiry for the purposes of 2 U.S.C. 192. But these cases

relate only to the issue of whether the witness was apprised of the subject under inquiry; they hold, in that connection, that the statement made to the witness, or the authorizing resolution itself, must be clear enough so he can ascertain the pertinency of the questions. They do *not* relate to the separate question of law (see *Deutch* v. *United States, supra,* 367 U.S. at 467–468) whether the questions were *in fact* pertinent, as 2 U.S.C. 192 requires. For this purpose, the government need only prove the subject under inquiry and the pertinency of the questions to the subject beyond a reasonable doubt, like any other element of the offense.

Here the government clearly met its burden of proof. There were statements in the record describing the subject of Communist activities in the United States more specifically than Senate Resolution 366. The Chairman of the Subcommittee told petitioner that the Subcommittee was "tracing the activities of the Communist Party in this United States" (see *supra,* p. 40). Similarly, the Subcommittee counsel testified at petitioner's trial that "[t]he subject matter of the investigation at all times is the activities of the Communist organization as it operates within the United States" (J.A. 90). Moreover, as we have seen (pp. 19–28), Senate Resolution 366, even more clearly than House Rule XI which was involved in *Watkins* and *Barenblatt,* conveys authority to investigate Communist activities generally. If Senate Resolution 366 confers this authority and if the government had proved only that the full scope of the reso-

lution was the subject under inquiry, the government would have proved a proper subject under inquiry. The questions petitioner refused to answer, we repeat, were clearly pertinent to this subject.[14]

V

PETITIONER WAS NOT ENTITLED TO DISMISSAL OF THE INDICTMENT OR A HEARING ON THE BASIS OF BROAD ALLEGATIONS THAT GOVERNMENT EMPLOYEES GENERALLY ARE BIASED

Petitioner contends (Pet. Br. 42–47) that the indictment should have been dismissed since the grand jury included government employees who were biased against him because the government's loyalty and security programs made them afraid to appear to be sympathetic with Communism. Alternatively, petitioner claims (Pet. Br. 46) that he was entitled to a hearing in the district court to allow him to prove bias. We show, however, in our brief in *Shelton* v. *United States*, *supra*, pp. 62–64, that a defendant is not entitled to dismissal of an indictment merely because government employees were on the grand jury. We have also shown in *Shelton*, pp. 64–76, that a defendant is entitled to a hearing to inquire into the

[14] Petitioner also contends (Pet. Br. 47–48) that the issue of pertinency should have been submitted to the jury rather than be decided by the trial judge. But as petitioner recognizes, this question was decided contrary to his position only last Term in *Braden* v. *United States*, *supra*, 365 U.S. at 436–437; accord, *Sinclair* v. *United States*, 279 U.S. 263, 299. Petitioner suggests that there is a distinction between this case and *Braden* in that here the government introduced oral evidence as to pertinency. But this was equally true in *Braden*. See the record in No. 54, Oct. Term, 1960, pp. 26, 30–37.

motives and beliefs of grand jurors—even if we assume, contrary to the holdings of numerous cases, that a defendant is sometimes entitled to such a hearing—*only* when he alleges specific and convincing facts of strong bias in individual grand jurors. Here, as in *Shelton* (see our brief in *Shelton*, pp. 76–78), petitioner's Motion to Dismiss the Indictment (J.A. 4) and accompanying affidavit (which is virtually identical with the affidavit in *Shelton* v. *United States*, *supra* (see the record in No. 9, pp. 4–8)) did not allege bias or fear with regard to any individual grand jurors and did not even state any specific facts of fear or intimidation among government employees generally resulting from the security program which petitioner would show if a hearing were granted. In these circumstances, the trial court properly refused to grant petitioner a hearing to conduct a general exploration of the motives and beliefs of the grand jurors.[15]

VI

THE INDICTMENT WAS NOT REQUIRED TO SPECIFY THE SUBJECTS UNDER INQUIRY OR THE PERTINENCY OF THE QUESTIONS TO THESE SUBJECTS, OR TO ALLEGE THAT PETITIONER'S REFUSAL TO ANSWER WAS WILFUL

The indictment alleged that the questions petitioner refused to answer "were pertinent to the question then under inquiry" and that "the defendant unlawfully refused to answer those pertinent questions" (J.A. 1). Petitioner claims (Pet. Br. 16) that the

[15] Petitioner also states (Pet. Br. 47), but does not argue, that the trial court erred in denying his motion to disqualify for cause government employees as petit jurors. As our brief in *Shelton* showed, p. 63, this Court has three times rejected this contention, once in a case virtually identical to that involved here. *Dennis* v. *United States*, 339 U.S. 162.

indictment was invalid because it failed (1) to specify the subject under inquiry when petitioner testified, (2) to specify the pertinency of the questions he refused to answer to this subject, and (3) to allege that his refusal to answer was wilful.

In our brief in *Shelton* v. *United States*, *supra*, pp. 78–83, we argue that petitioner's contention that the indictment was required to state the specific subjects under inquiry is inconsistent with Rule 7(c) of the Federal Rules of Criminal Procedure and with decisions both of this Court and the courts of appeals. For the same reasons, an indictment which states that the questions are pertinent to the subjects under inquiry need not provide the reasoning underlying this allegation of pertinency.

Petitioner's contention that the indictment must specifically state that the witness' refusal to answer is "wilful" has been repeatedly rejected. *United States* v. *Deutch*, 253 F. 2d 853 (C.A. D.C.); *Sacher* v. *United States*, 240 F. 2d 46, 53, 252 F. 2d 828 (C.A. D.C.); *Barenblatt* v. *United States*, 240 F. 2d 875, 878 (C.A. D.C.), reversed on other grounds, 354 U.S. 930.[18] While it is true that, where wilfulness is an element of the crime, the requirement cannot be ignored in the indictment, it is also true that the charge may include either that term or words of simi-

[18] The petitioner in *Price* v. *United States*, *supra*, relies (Pet. Br. in No. 12, p. 20) on *United States* v. *Lamont*, 18 F.R.D. 27, 32 (S.D. N.Y.) affirmed, 236 F. 2d 312 (C.A. 2), which dismissed an indictment on the ground, *inter alia*, that it failed to allege that the refusals to answer were wilful. In *Lamont*, however, unlike this case, the indictment did not allege that the witness had *unlawfully* refused to answer.

lar import. The allegation here that petitioner "unlawfully" refused to answer is sufficient to allege that the refusal was wilful in the sense of deliberate and intentional. See *Howenstine* v. *United States*, 263 Fed. 1, 3–4 (C.A. 9); *Rumely* v. *United States*, 293 Fed. 532, 547–548 (C.A. 2); *Finn* v. *United States*, 256 F. 2d 304, 306–307 (C.A. 4); *Chow Bing Kew* v. *United States*, 248 F. 2d 466, 471–472 (C.A. 9); *Griffith* v. *United States*, 230 F. 2d 607 (C.A. 6). This Court has held under 2 U.S.C. 192 that the criminal intent needed to constitute the offense was "a deliberate, intentional refusal to answer." *Quinn* v. *United States*, 349 U.S. 155, 165; see *Sinclair* v. *United States*, 279 U.S. 263, 299.

VII

THE TRIAL COURT DID NOT DEPRIVE PETITIONER OF A FAIR TRIAL BY DENYING HIS MOTION TO SUBPOENA THE SUBCOMMITTEE'S FILES AND BY REFUSING TO ALLOW HIM TO SECURE THE NAME OF A CONFIDENTIAL INFORMANT THROUGH CROSS-EXAMINATION

Petitioner contends (Pet. Br. 31–34) that he was deprived of a fair trial by the trial court's denial of his motion to subpoena the Subcommittee's files and its refusal to allow him to ask certain questions on cross-examination of the Subcommittee counsel concerning the information on the basis of which the Subcommittee subpoenaed petitioner.

A. Petitioner's motion to subpoena the records of the Subcommittee (J.A. 9) asked production of all written information in the Subcommittee's files (including confidential material) relating to petitioner or his wife. He sought these records on the ground

that they would show that the Subcommittee already had all the information it sought from petitioner and that therefore its purpose in subpoenaing petitioner was solely to harass and expose him (see J.A. 128). Therefore, petitioner reasoned, he would be able to show that the Subcommittee had had no legislative purpose and had violated his rights under the First Amendment (see J.A. 128–129).

The trial court properly denied this motion to produce. Even if the documents petitioner sought to obtain from the Subcommittee had contained the materials petitioner claimed, it is perfectly clear that the Subcommittee had a legislative purpose and that petitioner's First Amendment rights were not violated. This Court indicated in *Barenblatt* that a Congressional committee can subpoena a witness—at least when the investigation is in an area closely related to rights protected by the First Amendment—only if the committee has information giving reasonable ground to believe that the witness has information of value to the investigation. 360 U.S. at 134. After preliminary questions to identify the witness, Congressional committees usually ask the witness questions designed to determine whether the information possessed by the Subcommittee concerning the witness is accurate. If the witness states that the Subcommittee's information is accurate, this helps the Subcommittee in several ways. First, it virtually assures the correctness of the information the Subcommittee already has. Second, it helps to establish the validity of the sources from which the Subcommittee received the information and thereby indicates that other in-

formation provided by the same sources is also accurate. And, third, if the Subcommittee's information is accurate, the Subcommittee is in a position to ask further questions which are intended to provide entirely new information. Thus, even if petitioner had proved that the Subcommittee had all the information which petitioner could have provided in response to the questions he refused to answer, this information would still have been of considerable value to the Subcommittee. In short, the Subcommittee would have had a valid legislative purpose, and petitioner's First Amendment rights would not have been violated, even if the only information it could expect to obtain from petitioner was already known to it.

In addition, we submit, petitioner could not possibly have shown from the Subcommittee's files that the Subcommittee already had all the information known to petitioner. Petitioner refused to answer fourteen questions on which he was indicted and convicted. It is impossible to ascertain what information petitioner could have given in answer to these questions. And if petitioner had cooperated with the Subcommittee by answering questions, it is impossible to ascertain what further questioning the Subcommittee would have asked and what petitioner could have answered.

Petitioner, however, now claims that he needed to have the files of the Subcommittee to show that the Subcommittee had no basis to subpoena him. The first, and conclusive, answer to this contention is that petitioner did not present this reason to the trial court in support of the subpoena. Indeed, peti-

tioner argued a contradictory proposition. Instead of claiming that the Subcommittee had no basis on which to subpoena him, petitioner argued that the Subcommittee already had all the information which it sought to obtain from him. This argument implicitly assumes that this information was accurate.

Second, we submit that, even if petitioner had sought the subpoena on the ground that the Subcommittee had no probable cause to subpoena him, he was not entitled to obtain the files of the Subcommittee. Obviously, if Congressional committees were required to produce substantial portions of their files whenever they wished to enforce their directions to witnesses, the result would be to interfere seriously with Congressional investigations, for committees would not ordinarily be willing to disclose confidential information. Nevertheless, petitioner might have been entitled to these files if the issue of "probable cause" was an element of the criminal offense which the government was required to prove. This, however, is not the case. Instead, *Barenblatt* shows that "probable cause" is one of several considerations in determining whether First Amendment rights have been violated (see 360 U.S. at 134)." When the Court in *Barenblatt* and *Wilkinson* v. *United States*, 365 U.S. 399, referred to "dragnet procedures" and "probable cause" (360 U.S. at 134; 365 U.S. at 412), we believe that it did not mean to suggest that the sufficiency of the information and reasons which cause a committee to call a witness

[11] For a full discussion of the meaning of "probable cause" in this context, see the government's brief in *Shelton*, pp. 50–55.

should be subject to plenary judicial review. Rather, we believe, the Court intended at most to require only that Congressional committees present information showing a reasonable basis for their decision to subpoena the witness. See *Sacher* v. *United States*, 240 F. 2d 46, 50 (C.A. D.C.), reversed on other grounds, 354 U.S. 930. Here the Subcommittee counsel described in considerable detail the information possessed by the Subcommittee as to petitioner's Communist activities (see *supra*, pp. 4–5.) This evidence is sufficient for a court to decide whether the information described by the Subcommittee constitutes "probable cause," *i.e.* that it was reasonable for the Subcommittee to believe that it could obtain pertinent testimony from the witness.[18]

In short, we believe that the decision whether to subpoena a witness is mainly for the legislative body. To superimpose on a trial for contempt a full-scale trial of a committee's judgment would be an invasion of the prerogative of the legislature and a serious interference with Congressional investigations. The permissible scope of a Congressional investigation, which of necessity must proceed step by step, is not to be limited by the strict requirements of a criminal prosecution.

B. As to petitioner's contention that the trial court

[18] Petitioner does not claim in this Court that the Subcommittee in fact did not have probable cause to subpoena him. The Subcommittee's information that petitioner actively participated in Communist activities, particularly in the South (see *supra*, pp. 4–5) constituted reasonable basis for the Subcommittee to believe that he had information of considerable value to its investigation of the Party's organization, Communist activities generally, and particularly in the South.

denied him the right of cross-examination, he relies entirely (Pet. Br. 31–34) on the trial court's refusal to allow him to ask three questions of the Subcommittee counsel. The first asked for the name of the informant who had provided the Subcommittee with its information concerning petitioner (J.A. 98). The second and third questions, which were obviously related to the first question, were whether the informant was a professional or casual informant and the "full extent, in terms of time, of your conferences with this person with respect to [petitioner]" (J.A. 98, 100). The government objected to the latter question "on the theory of the protection of the confidential character of the informant's identity" (J.A. 100). The Subcommittee counsel had previously described the considerable information possessed by the Subcommittee concerning petitioner's Communist activities both on direct and cross-examination (J.A. 76–81, 99–101). On cross-examination, he further stated that this information "came from a very reliable informant"—"One whose information in the past proved to be so accurate that I would accept the information again" (J.A. 100). The court did allow, and apparently would have continued to allow, other similar questions designed to ascertain the reliability of the informant as long as they did not compromise his identity. All the questions which the trial court refused to allow petitioner to ask were directly related to the actual identity of a particular confidential informant.

A trial court, of course, has broad discretion in determining the scope of cross-examination, and a conviction can be reversed only if this discretion has been seriously abused. *E.g., Glasser* v. *United States,* 315 U.S. 60, 83. We submit that the trial court properly exercised its discretion in refusing to allow these particular questions on cross-examination. Petitioner's contention, if accepted, would mean that a Congressional committee would have to disclose its confidential informants in order to punish a contemptuous witness. Such an extreme interference with the legislative process is not warranted for the same reasons that petitioner was not entitled to subpoena the files of a Congressional committee (see *supra,* pp. 51–55). In both situations, petitioner's sole basis for seeking the confidential information is his unsupported hope that the information will discredit the detailed testimony of Subcommittee counsel concerning an issue which is not an element of the offense. It would clearly be going too far to hobble Congressional inquiries by permitting recalcitrant witnesses to demand revelation of the committee's prior information as the price of their testimony. A witness who refuses to answer questions asked by a Congressional committee is not entitled to the disclosure of the confidential files of the committee, either directly or by cross-examination of government witnesses, before he can be punished for contempt.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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